No. 261.

Filed Oct. 11, 1899.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 261.

ROBERT RAE, Jr., and ELIZABETH RAE,
Plaintiffs in Error,
vs.
HOMESTEAD LOAN AND GUARANTY COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

MOTION TO DISMISS OR AFFIRM, AND ARGUMENT IN SUPPORT THEREOF.

JOHN P. WILSON,
WM. B. McELVAINE,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

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MOTION.

Now comes the defendant in error and moves the court to dismiss the writ of error in said cause for the following reasons:

First. Because the decision of the Supreme Court of Illinois in said cause was not against the validity of any treaty, statute of, or authority exercised under the United States.

Second. Because the decision of the Supreme Court of Illinois in said cause was not in favor of the validity of a statute of, or an authority exercised under any state claimed in said cause to be repugnant to the Constitution, treaties or laws of the United States.

Third. Because no title, right, privilege or immunity of the plaintiffs in error, under the Constitution, or any treaty or statute of, or commission held, or authority ex-

ercised under the United States was specially set up and claimed by the plaintiffs in error in said cause, nor was the decision of the Supreme Court of Illinois in said cause against any such title, right, privilege or immunity of the plaintiffs in error.

And the defendant in error further moves the court to affirm the judgment of the Supreme Court of Illinois in said cause for the reason that it is manifest that the writ of error in said cause was taken for delay only, and for the further reason that the question on which the jurisdiction of this court depends is frivolous.

JOHN P. WILSON,
WM. B. MCILVAINE,
Counsel for the Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1899.

No. 261.

ROBERT RAE, Jr., and ELIZABETH RAE, *Plaintiffs in Error,* *vs.* **HOMESTEAD LOAN AND GUARANTY COMPANY,** *Defendant in Error.*	In error to the Supreme Court of the State of Illinois.

STATEMENT.

On the sixteenth day of October, 1896, the defendant in error filed in the Circuit Court of Cook County, in the State of Illinois, its bill in chancery alleging that plaintiff in error, Robert Rae, Jr., was indebted to the complainant in the sum of forty-nine hundred dollars in gold coin of the United States of America of the then standard weight and fineness, evidenced by the bond of the said Robert Rae, Jr., secured by a mortgage or trust deed on real estate in Cook County. The bill alleged default in the payment of the amount due to complainant and prayed for the foreclosure of the mortgage or trust deed securing the bond. The plaintiffs in error, Robert Rae, Jr., and Elizabeth Rae, his wife, appeared and filed their demurrer to the bill and set forth the following causes of demurrer (Rec., 17):

(1.) The matters and things set out in the complainant's bill are contrary to public policy and void.

(2.) Because it is not lawful for the complainants and the defendants to make any money but gold and silver money a money tender in payment of any debt contracted in the United States to be paid in the United States.

(3.) That so much of the act of Congress of February 28, 1878, entitled, "An act to authorize the coinage of the standard silver dollar, and to restore its legal tender character," which provides that gold and silver money of the United States shall be a legal tender for payment and discharge of debts and obligations is valid, but the proviso permitting parties to make such special contracts as they please as to the payment of debts and obligations in money other than gold and silver is void.

(4.) That the contract or mortgage set forth in said bill and the relief prayed therein is void as against public policy.

(5.) That by virtue of Article 1, Section 8, paragraph 5 of the Constitution of the United States, Congress alone has "power to coin money and regulate the value thereof," and that by Article 1, Section 10, paragraph 1 of said constitution it is provided that "no state shall coin money, emit bills of credit or make anything but gold and silver coin a tender" in payment of debts in contracts made in the United States to be performed in the United States. Said defendants claim jointly and severally the benefit of said constitutional provisions.

(6.) That said bill should be dismissed for want of equity.

The demurrer was overruled by the Circuit Court and plaintiffs in error elected to abide by their demurrer and refused to answer over. Thereupon, on February 15,

1897, a decree of foreclosure was entered finding that the plaintiffs in error were indebted to defendant in error in the sum of five thousand eight hundred fifty-seven dollars and seventy-six cents, and decreeing that unless said sum was paid within five days the premises described in the mortgage should be sold (Rec., 18).

The decree did not direct the payment of the sum found due in gold coin of the United States.

Plaintiffs in error thereupon appealed to the Appellate Court of the State of Illinois, First District, and assigned for error the action of the Circuit Court in overruling the demurrer above mentioned and in not dismissing the bill because the bill claimed a sum due in gold coin of the United States of the present standard weight and fineness. (Rec., 22.) The decree was affirmed by the Appellate Court and the decision reported as *Rae* v. *Homestead Loan and Guaranty Company*, 76 Ill. App. Ct. Rep., 548.

The Appellate Court, in its decision by Mr. Justice HORTON, said:

> "The only question presented in this case is whether the contract embodied in said bond for payment in 'gold coin' is against public policy and void.
>
> "This question is most elaborately and exhaustively argued on behalf of appellant. But it is not an open question for this court, and even if we were disposed to sustain his position (which we are not), the validity of said bond is settled by the Supreme Court of this state in *Belford* v. *Woodford*, 158 Ill., 122. It is there held that a contract expressly made payable in gold coin is not void, but is enforcible as made."

From the judgment of the Appellate Court the plaintiffs in error appealed to the Supreme Court of Illinois and made the same assignment of errors in that court which was made in the Appellate Court. (Rec., 26.) The

Supreme Court affirmed the decree of the Circuit Court. Its decision is reported as *Rae* v. *Homestead Loan and Guaranty Company,* 178 Ill., 369. The opinion is shown in the record on page 30.

The Supreme Court held in substance that the decree of the Circuit Court did not require payment in any particular kind of money, and therefore the plaintiffs in error were not prejudiced by the decree; that even if the character of money in which payment was contracted to be made should be rejected from the contract, nevertheless the plaintiffs in error were liable to pay in some kind of legal tender.

From this judgment of the Supreme Court of Illinois plaintiffs in error have sued out the present writ of error.

ARGUMENT.

I.

THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE NO FEDERAL QUESTION IS INVOLVED.

Under section 709 of the Revised Statutes the final decree of a state court may be re-examined in this court:

First. Where is drawn in question the validity of a treaty, or statute of, or authority exercised under the United States, and the decision is against their validity.

Second. Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.

Third. Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such constitution, statute, commission or authority.

The contention of counsel for plaintiffs in error in the various courts in which this case has been tried has been that a contract payable in gold coin of the United States is void.

We have been referred to no treaty or statute of the United States which prohibits the making of contracts payable in gold. The decision of the Supreme Court of Illinois certainly was not against the validity of any such

treaty or statute. It is impossible, therefore, that the jurisdiction of the court in this case can be based upon the first clause of the statute referred to.

There is no reference in the record to any statute of the United States relating to the question at issue, except under the third heading of the demurrer filed to the original bill. (Rec., 17.) Under this section of the demurrer it is claimed that the act of Congress of February 28, 1878, authorizing the coinage of the silver dollar, is void in certain particulars. If the judgment of the Supreme Court of Illinois can be construed to refer in any way to that statute, the decision of the court was certainly in favor of the validity of the statute, and not against its validity.

The record discloses and we have been referred to no statute of or authority exercised under the State of Illinois relating to contracts payable in gold which are claimed to be repugnant to the Constitution and laws of the United States. It is certainly not disclosed in the record that any such statute or authority exists. The decision of the Supreme Court of Illinois in this case was not in favor of the validity of any such statute or authority.

It must be, therefore, that plaintiffs in error rely upon clause 3 of Sec. 709 of the Revised Statutes to maintain the jurisdiction of this court in the present case.

It is settled by repeated decisions of this court that to give this court jurisdiction to review the judgment of a state court under section 709 of the Revised Statutes, because of the denial by the state court of a right, title, privilege or immunity claimed under the Constitution or laws of the United States, it must appear on the record that

such title, right, privilege or immunity was specially set up or claimed.

Leeper v. *Texas*, 139 U. S., 462-467.
Oxley Stave Co. v. *Butler County*, 166 U. S., 648.
Mutual Life Ins. Co. v. *Kirchoff*, 169 U. S., 103.
Kipley v. *Illinois*, 170 U. S., 182.
Water Power Company v. *Street Railway Co.*, 172 U. S., 475-488.

In the case of *Kipley* v. *People, supra,* Justice HARLAN, speaking for the court, said:

> "Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right. * * * The averment in the answer, that the statute of Illinois was unconstitutional and void, must be taken as intended to apply to the constitution of that state and not to the Constitution of the United States."

From the record in this case does it appear that plaintiffs in error have made a distinct and positive claim to some right or immunity under the constitution and laws of the United States which has been denied them by the courts of Illinois?

Such claim must be set forth, if at all, in the demurrer to the original bill (Rec., 17) or in the assignment of errors in the Supreme Court (Rec., 26).

The first and fourth grounds of the demurrer are that the contract or mortgage and matters set up in the bill are contrary to public policy and void. The second ground of demurrer is that it is not lawful for the complainant

and defendants to make any money but gold and silver money a tender in payment of debt.

In none of these three grounds of demurrer is there a reference except by inference to the Constitution and laws of the United States, and on the authority of the Kipley case, *supra,* these grounds of demurrer must be held to refer to the laws of Illinois, and therefore to raise no federal question.

The third ground of demurrer in terms recognizes that gold is a legal tender. Inasmuch as the mortgage or contract at issue is payable in gold and has been held valid, it is difficult even to infer from this ground of demurrer what title or immunity under the Constitution and laws of the United States plaintiffs in error are claiming.

In the fifth ground of demurrer the plaintiffs in error claim the benefit of the constitutional provisions contained in Article 1, Section 8, paragraph 5 of the Constitution of the United States to the effect that Congress alone had the power to coin money and regulate the value thereof; and in Article 1, Section 10, paragraph 1, to the effect that no state shall coin money, emit bills of credit or make anything but gold and silver coin a tender in payment of debts.

In this paragraph of their demurrer plaintiffs in error clearly set forth the provision of the United States constitution upon which they rely. No attempt is made, however, to show what title, right, privilege or immunity is claimed by the plaintiffs in error under the provisions of the constitution relied on or to show in what respect the decision of the Supreme Court of Illinois in this case is against such privileges and immunities.

The power of Congress to coin money and regulate the

value thereof was not questioned in this case, nor was it decided that the State of Illinois could coin money, emit bills of credit or make anything but gold and silver coin a tender in payment of debts.

It is difficult again to infer what possible rights or immunities plaintiffs in error have under the sections of the Constitution relied on which have been denied them by the judgment of the Supreme Court of Illinois in this case. If contracts payable in gold are prohibited by the Constitution and laws of the United States, plaintiffs in error should have been able to point out clearly what part of the Constitution or what law of the United States prohibits such contracts. At least they could have stated clearly on the record that such contracts are so prohibited. We contend that they have done neither.

As the averments of the assignment of errors in the Supreme Court of Illinois (Rec., 26) allege no grounds of jurisdiction in this court in addition to those set forth in the demurrer, the record in this case fails to show that this court has jurisdiction of this case and the writ of error should be dismissed.

II.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS SHOULD BE AFFIRMED.

We have united with our motion to dismiss the writ of error a motion to affirm the judgment of the Supreme Court of Illinois for the reason that it is frivolous to contend in this court in view of the prior decisions of the court that a contract payable in gold is void, and hence that it must be obvious to the court that the writ of error herein was sued out for delay.

It has been regarded as the settled law of the United States since the decisions of this court in *Bronson* v. *Rodes,* 7 Wall., 229, and *Trebilcock* v. *Wilson,* 12 Wall., 687, that contracts calling for payment in any legal tender money of the United States are valid and cannot be fulfilled by the tender of money other than that specifically mentioned.

In the *Bronson* case Chief Justice CHASE, speaking of the contract, said in rendering the court's opinion:

> "Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute, *and this intent was lawful.* * * * If, then, no express provision to the contrary be found in the acts of Congress, it is a just if not a necessary inference from the fact that both descriptions of money were issued by the same government, that contracts to pay in either were equally sanctioned by the law. *It is indeed difficult to see how any question can be made on this point.*"

In the *Trebilcock* case a similar question was again before the court and Justice FIELD, speaking for the court, said:

> "As the act of 1862 declares that the notes of the United States shall also be lawful money and a legal tender in payment of debts, and this act has been sustained by the recent decision of this court as valid and constitutional, we have, according to that decision, two kinds of money, essentially different in their nature, but equally lawful. It follows from that decision that contracts payable in either or for the possession of either must be equally lawful, and if lawful must be equally capable of enforcement."

In each of the cases cited a contract payable in gold or gold and silver was sustained and enforced as made.

To the same effect is the concurring opinion of Justice Field in *Woodruff* v. *Mississippi,* 162 U. S., 291-304.

On the authority of these cases, countless contracts have been made in the United States payable in gold. Thousands of such contracts are now in force.

The contention at this date that such contracts are absolutely void is not worthy of serious discussion.

The decision of the Supreme Court of Illinois in upholding the contract at issue was clearly right and should be affirmed.

In the case of *Foster* v. *Kansas*, 112 U. S., 201, 206, Chief Justice WAITE, speaking for the court, said:

> "We have jurisdiction and the motion to dismiss must be overruled, but as every one of the questions which we are asked to consider has been already settled in this court the motion to affirm is granted."

The following cases are to the same effect:

Richardson v. *Louisville, &c., R. R.*, 169 U. S., 128, 132.
Church v. *Kelsey*, 121 U. S., 282.
Chanute City v. *Trader*, 132 U. S., 210.
Kauffman v. *Wootters*, 138 U. S., 285.

In cases where writs of error have been sued out on frivolous grounds the judgments of the lower courts have been affirmed in this court.

Micas v. *Williams*, 104 U. S., 556.
Evans v. *Brown*, 109 U. S., 180.
The S. C. Tryon, 105 U. S., 267.

We respectfully submit that the writ of error should be dismissed or the judgment of the Supreme Court of Illinois affirmed.

JOHN P. WILSON,
WM. B. MCILVAINE,
Counsel for Defendant in Error.